
WORKERS' COMPENSATION LAW
REVIEW OF THE NJ SUPREME COURT TERM 1995-1996

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# Parameters Defined for Benefits in Occupational Disease Claims: Weighing Standards and Remedial Intent

NJ Supreme Court Review 1995-1996

The 1996 court term set forth standards for occupational disease claims, defined defenses available, provided interpretation regarding third-party liens, further defined standards to be utilized in the presentation of evidence, and set forth parameters concerning the nature and extent of disability under the Workers' Compensation Act. Both the New Jersey Supreme Court and the Appellate Division were quite active in ruling on issues not only specific to the Workers' Compensation Act [such as the exclusivity bar, claims arising out of or in the course of employment, the coming and going rule, cancellation of insurance, employment status, medical treatment, pension benefits, and the availability of benefits] but also in other areas of both statutory and case law.

Occupational disease claims continue to be a focal point of attention with the New Jersey Supreme Court. In a series of three cases involving psychiatric, orthopedic and pulmonary disability, the court further defined the parameters for awarding compensation benefits.

## School custodian receives award for asbestos exposure

In the first case to come before the New Jersey Supreme Court involving the scientific evidence standards outlined in Fiore v. Consolidated Freightways, 140 N.J. 452 (1995), the court permitted a custodian for the West Milford Board of Education, who died of cancer after exposure to asbestos in the school, to recover benefits under New Jersey's Workers' Compensation Act. The decision of the New Jersey Supreme Court denied the employer's request for certification following opinions favorable to the petitioner in both the appellate and trial courts, implying the court's approval that the petitioner had satisfied the evidentiary standards that it had set forth in its landmark decision in Fiore. Whritenour v. Township of West Milford Board of Education, et al., No. A-1883-94T5, slip op (App.Div. Jan. 2, 1996) (per curiam), Certification Denied No. 41,820, slip op (April 23, 1996).

Lawrence Whritenour, a cigarette smoker for more than 34 years, worked in the West Milford Schools as a custodian from 1980 through 1991 when he discovered that he had lung cancer. Whritenour died at the age of 62 before the final adjudication of the claim by the New Jersey Supreme Court, which concluded that his bystander exposure to asbestos fiber was considered significant enough to cause his fatal illness. At trial, it was demonstrated not only that asbestos was used as an insulation product in the school but also that the custodian was present during the abatement process.

The Whritenour matter is a logical application of the Fiore doctrine, which embodies the principle that the employer must maintain a safe workplace free from pollution, even if the offending substance is produced by secondary causes. The case further alerts injured employees that they have a remedy for diseases caused by bystander exposure in the workplace. The court demonstrated its awareness that occupational exposure claims result from multifactorial disease processes. The court's decision suggests that adherence to industrial hygiene standards would result in safer workplaces.

In establishing this successful claim, the petitioner was able to show that his disease was due in a material degree to causes arising out of the workplace, that the causes were particular to the place of employment, and that the medical evidence presented was sufficient to demonstrate that the exposure

caused or contributed to the disease process. In the Whritenour matter, the trial court had the opportunity to review documentary evidence of asbestos fiber in the school system, scientific literature, and expert medical testimony. The court evaluated all of the evidence and reached a logical and rational decision after weighing both the facts and the scientific basis for the causal relationship between occupational exposure to asbestos and the resulting fatal disease process, lung cancer.

### Litigation stress, not compensable

Consistent with the majority of opinions in state and federal cases, the Supreme Court did not recognize disability from litigation-induced stress as a recoverable component in emotional distress claims. Recognizing that it is universally accepted that anxiety is an unavoidable consequence of the process of litigation, the court held that resultant psychological disability does not support a separate basis for recovery. The Assistant Superintendent for Business and Board Secretary of the Cherry Hill Board of Education was falsely accused of various acts of misconduct, including theft, conspiracy, and improper expenditure of tax dollars. The school board adopted the superintendent's termination recommendation, and the employee filed suit. The trial court entered an award of $560,000.00 in emotional distress damages based upon many factors, including the stress caused by the litigation. The total judgment entered for economic damages at trial was $750,000.00. In following a consistent and almost unanimous line of case law throughout the country, the Supreme Court concluded that the plaintiff chose to pursue litigation and was aware of both the economic and the emotional cost that it would entail. While the court recognized that a portion of the plaintiff's stress was caused by a general distaste for litigation and vigorous participation in the process, the plaintiff could not recover damages for normal results of becoming a litigant. Since the emotional distress damages award did not reflect the specific amount intended to compensate for litigation-induced stress, the entire award was vacated, and the matter was remanded for a new trial on damages alone. Picogna v. The Board of Education of the Township of Cherry Hill, et al., 143 N.J. 391 (1996).

### Repetitive stress injuries

In another matter, the court recognized that the modern workplace is technologically sophisticated and that ergonomics present new situations which have generated an epidemic of repetitive stress injuries. A clerk-bookkeeper in the New Jersey Department of Corrections suffered carpal tunnel syndrome, a disease associated most frequently with repetitive stress. In this instance, the employee contracted the disease as a computer operator due to the constant use of the keyboard. Her complaints consisted of numbness in the fingers of both hands and pains in her arms and shoulder. While the court recognized that such conditions might develop due to off-the-job activities, including weekend sports in the form of tennis elbow and epicondylitis, the court concluded that the condition was compensable. It held those office workers who regularly use computers often suffer from various debilitating hand and wrist disorders resulting in tendonitis and carpal tunnel syndrome. In Matter of Musick, 143 N.J. 206 (1996).

### Exclusivity rule

In a series of Appellate Division rulings, the extent of the parameters of the Workers' Compensation Act was reviewed. The time-honored "exclusivity rule," which bars employees from bringing an action against an employer outside of the workers' compensation remedy, was the subject of two decisions. Even though a plaintiff was creative in attempting to draft a complaint couched in language which was designed to attempt to survive the exclusivity provision of the Workers' Compensation Act, the insurance company was permitted to invoke the "exclusivity doctrine." In a case in which a fatal injury to two workers resulted in claims for dependency death benefits and funeral expenses, the allegation of conduct arising to the level of "intentional wrong" was insufficient to permit a common-law action. The plaintiffs were not able to prove the employer's deliberate intention to injure to satisfy the requirement

of intentional wrong and escape the exclusivity provisions of the Workers' Compensation Act. New Jersey Manufacturers Insurance Company v. The Joseph Oat Corporation, et al., 287 N.J.Super. 190 (App.Div. 1995).

The severe inequities permitted by the Workers' Compensation Act were recognized again by the Appellate Division when it was faced with determining liability in the amputation of a worker's arm by a machine. Pedro Calderon was an employee of the Alpha Paper Recycling Company in Jersey City and was responsible for the baling and compacting machine. While reaching into the machine to untangle some wires, four large steel rods became activated and caused him severe injury. The jury determined that while the manufacturer's warnings were inadequate, they were not the cause of the plaintiff's injuries. The employer had removed safety grates from the machine two years before the accident, and this action was determined to be the probable cause of the plaintiff's injuries. Judge Dreier wrote in the opinion of the court that, even though the theory was not propounded by the plaintiff, the facts in the matter may also have raised the issue of "whether an employer's removal of safety devices rises to the level of an intentional tort, thereby triggering the statutory exception to the Workers' Compensation Act in N.J.S.A. 34:15-8." The court recognized the deficiency in the Workers' Compensation Act wherein the employer purchases a workers' compensation policy that grants a license to commit negligent acts for financial gain, all to the employee's detriment. The employee's recovery is limited to the statutory recovery prescribed by the Workers' Compensation Act, and he is not able to recover for "pain and suffering" and/or punitive damages.

The Appellate Division, in dicta, "envisions liability on the part of a corporation whose management personnel or other employees have removed safety devices so that the risk is raised to such a high level that it is practically certain some employee would be injured." The court recognized that this might be an extension of the erosion of the exclusivity doctrine consistent with aspects of Millison v. E.I. DuPont de Nemours & Co. Inc., 101 N.J. 161 (1995). Calderon v. Machinenfabriek Bollegraaf Appingedam BV, 285 N.J.Super. 623 (App.Div.1995).

### Successor liability

The issue of successor liability was also addressed by the Appellate Division. When a company is purchased through a merger, and the successor company acquires both the assets and the liabilities of the predecessor company, the predecessor company is still shielded by the exclusivity doctrine. In a third case, an employee was injured when a punch-press die machine he was operating unexpectedly failed and amputating part of his thumb and crushing two fingers. The employee successfully pursued a workers' compensation claim directly against the employer. The predecessor company, which had sold assets and liabilities to the successor company in conformance with N.J.S.A. 14A:10-6(e), was shielded from a product liability claim by the injured employee. The court held that the predecessor company was not a seller or supplier of the machine since the acquisition by merger does not make the former owner a manufacturer or distributor. Vega v. Standard Machinery Co. of Auburn, 290 N.J.Super. 434 (App.Div.1996).

### Arising out of and in the course of employment

In a series of two cases, the Appellate Division reviewed issues involving claims arising out of employment or in the course of employment. In a claim involving recreational activities, the court held that an employee who was injured while participating in a tug-of-war game sustained an injury during a recreational activity during her employment. The court reasoned that the petitioner was required to appear at the picnic where the employees of two companies were to become familiar with each other. The employee was a bookkeeper, and the joint picnic had been scheduled during business hours by a memorandum indicating that the employees' attendance was mandatory. In fact, the president

addressed the employees of both companies at the affair and suggested that the bookkeeper, who was the injured employee, socialize with the other workers. She was specifically asked to participate in the tug-of-war activity, which resulted in her injury. McCarthy v. Quest International Company, 285 N.J.Super. 469 (App.Div.1995).

The coming-and-going rule was addressed in a parking lot injury claim. An employee arrived for work and parked in the employee parking lot owned and maintained by the employer. While exiting his car in the parking lot he took a step to walk toward his workplace, twisted his left knee, and heard a popping sound. The court held that the torn medial meniscus and chondromalacia patellae were both compensable injuries since the event was incidental to the employment. The court analyzed the nature of the risk and found it to be "distinctly associated" with the employment situation since the twisting of the knee occurred as the petitioner was walking toward the workplace. The respondent did not meet the burden of proving that the injuries were solely caused by personal conditions or that there was a preexisting disability. Shaudys v. IMO Industries, Inc., 285 N.J.Super. 407 (App.Div.1995).

### Medical treatment

The availability of benefits was reviewed by both the Supreme Court and the Appellate Division. In a claim involving medical treatment, the Appellate Division determined that an employer must provide medical treatment to the injured worker even if the treatment is deemed "palliative" as long as the treatment is necessary for the relief or cure of the effects of the work-related accident. A police officer required the use of a TENS unit, a half hour of instruction in its use, and similar instruction on certain exercises. The petitioner's medical expert indicated that such treatment was necessary not to cure but to relieve the pain that he was experiencing. The court approved the treatment since such treatment would relieve the petitioner's symptoms and improve his ability to function. Hanrahan v. Township of Sparta, 284 N.J.Super. 327 (App.Div.1995), Certification Denied by 143 N.J. 326 (1995).

### Permanent Disability

In determining what permanent disability benefits were to be compensated cumulatively, the court indicated that the compensation judge must evaluate multiple injuries to avoid an overlap of disability which would artificially escalate an award. The judgment must reflect the true cumulative loss of function and working ability which can be objectively supported by the record. A simple mathematical accumulation of separate awards does not satisfy the standard. When a worker was injured when a piece of plexiglass he was cutting struck his chin, upper chest, and wrist, the trial court evaluated separate injuries and assessed disability individually. The trial court awarded 25% of the right hand for an ununited carpal navicular fracture and laceration, 15% of the partial total for fracture of the mandible, 10% of the partial total for otological disability for the residuals of TMJ syndrome, bilateral ear canal fracture and tinnitus, 10% of the partial total for cosmetic disfigurement of the chin and lip, a 25% binaural hearing loss, and an additional statutory benefit for loss of two teeth. The Appellate Division considered the mere addition of these awards, three hundred three and a quarter weeks of compensation at $283.00 per week or $85,890.50, to be excessive. The reviewing court found no basis in the judge's opinion, either in the record or in the judge's conclusion, for adding the disabilities together to produce a cumulative total. Ventre v. CPC International, Incorporated/C.F. Mueller Co., 285 N.J.Super. 567 (App.Div.1995).

In reviewing issues concerning the nature and extent of permanent disability and the standard to be followed in making that determination, the court held that repetitive motion trauma resulting in a neuroma requiring surgery to the right hand was compensable. Following medical treatment, a worker was promoted to a supervisory position which entailed clerical duties and required him to possibly substitute for an absent installer. He continued with difficulties with his right hand, including his thumb,

which became numb at times, and he had pain in his wrist when he attempted to play with children or perform in sports such as volleyball. The court held that the petitioner's inability to carry on ordinary pursuits of life and the positive findings of the examining physician, including tenderness and loss of strength in the right wrist, resulted in a loss of function of 12 ½% of the right hand which was deemed compensable and satisfied the 1979 amendments to the Workers' Compensation Act which placed limitations on minor injuries. Perez v. Monmouth Cable Vision, 278 N.J.Super. 275 (App.Div.1994).

### The Odd Lot Doctrine

On the other end of the permanency spectrum, the Appellate Division addressed the issue of the "Odd Lot Doctrine" and held that the court might direct the parties to obtain current medical expert examinations when a matter has been remanded. In this instance, the petitioner was injured in April of 1989, a hearing was commenced in 1993, and a trial decision was rendered a year later in 1994. Even though the respondent's expert had evaluated the petitioner on four occasions, in its decision of March 1996, the reviewing tribunal directed that the parties obtain current evaluations on remand to determine whether the petitioner's current disability approached the statutory 75% to effectuate total disability under the Odd Lot doctrine. Perez v. Capitol Ornamental, Concrete Specialties, Inc., 288 N.J.Super. 359 (App.Div.1996).

### Insurance Coverage - Cancellation

Cancellation of an insurance contract became an issue when an employee was injured after the policy expiration but before the effective renewal date. The court held that a workers' compensation carrier is not required to renew a policy if a premium is not paid. While the insurer must provide timely notice of the expiration date and the required renewal deposit premium, it is not obligated to renew the policy until payment is made. New Jersey Manufacturers Insurance Company was not required to provide coverage where a policy expired on December 3, 1987, even though a renewal quote had been issued on October 29, 1987, demanding a deposit premium by November 28, 1987, the petitioner suffered an accident on December 7, 1987, and the policy was in fact renewed on December 9, 1987. Romanny v. Stanley Baldino Construction Co., 142 N.J. 576 (1995).

### Employment Status

The Appellate Division also reviewed issues involving employment status during the last term. A licensed practical nurse was injured when she slipped and fell on a wet floor while working at a healthcare facility. Even though the petitioner was employed by a Labor Services Company which was in the business of supplying skilled nursing personnel to many health facilities temporarily, she was considered an employee of the facility where she was injured. The court deemed the employee to have two employers. Kelly v. Geriatric and Medical Services, Inc., et al., 287 N.J.Super. 567 (App.Div.1996).

The nature of the work test was employed in a claim in which the employee's work was functionally integrated into the employer's operation in addition to the demonstration of substantial economic dependence upon the employer. In this case, the employee was deemed not to be an independent contractor. An individual who was employed as a plasterer by a New Jersey employer and who was required to tape the seams of the drywall and ceiling in preparation for paint fell from a scaffold and sustained injury. The court held that the employment relationship was not that of an independent contractor since the injured worker was an integral part of the employer's business which entailed the rehabilitation of buildings. The employee worked long hours, did not work for anyone else during the period of his relationship with the employer, and was economically dependent upon the employer. Fernando-Lopez v. Jose Cervino Inc., 288 N.J.Super. 14 (App.Div.1996).

### Undocumented Alien

Defenses available to the respondent were not expanded by the court this year. In a series of two cases, the New Jersey courts reasoned that public policy would be subverted if employers were permitted to hire illegal aliens instead of citizens or legal residents, knowing that they would not be required to insure or absorb the cost of injuries incurred by these illegal aliens in the course of their employment. In the Fernando-Lopez case, an undocumented alien was injured during his employment as a plasterer. The court held that the petitioner's status as an illegal and undocumented alien did not prohibit him from collecting New Jersey workers' compensation benefits. In another matter, the court also concluded that the need for medical treatment is not a benefit derived from immigration status but rather from employment status. Mendoza v. Monmouth Recycling Corp., 288 N.J.Super. 240 (App.Div.1996).

### Notice

Notice was raised as a defense by a respondent to deny compensability. The court determined that the notice requirement is jurisdictional, and since the workers' compensation statute is intended to avoid prejudice to the employer, late notice is permitted and will not bar the claim where the employer is not prejudiced by the such late notice. While working in various capacities for approximately 30 years, an employee was exposed to asbestos fiber. In 1987 the employee retired. In 1988 the retired employee consulted with both a lawyer and a doctor. In November of 1989, the employee had actual knowledge that he suffered from asbestosis. In 1990, a third-party products liability claim was filed against the manufacturers, distributors, and suppliers of asbestos material due to his asbestosis. In March of 1991, the former employee received the proceeds of the first settlement from a defendant in the third-party action. On October 23, 1991, within two years after he had knowledge of his occupationally-related disease, the former employee filed a workers' compensation claim against his former employer. The court did not bar the claim even though the employee had not notified his former employer until the filing of the workers' compensation claim. The court held that where the employer was not prejudiced by the receipt of late notice and did not dispute that the disability was work connected, the employee would not be deprived of the statutory benefits. The court reasoned that the purpose of the notice provision of the Statute is to avoid prejudice to the employer by permitting the employer the opportunity to provide immediate medical diagnosis and treatment to mitigate damages and to facilitate the earliest possible investigation of the factual allegations. The court held that there was no legislative intent that would be served by barring the claim of the injured worker, who suffered from a compensable occupational disease, because of failure to give timely notice to the employer. Brock v. Public Service Electric and Gas Co., 290 N.J.Super. 221 (App.Div.1996). *[Note: This case was reversed by the NJ Supreme Court. Brock v. Public Service Elec. & Gas Co., 693 A. 2d 894 - NJ: Supreme Court 1997.]*

### Statute of Limitations

The statute of limitations defense was not expanded by the Appellate Division when it determined that correspondence regarding a medical evaluation conducted by the respondent to determine the necessity of additional medical treatment did, in fact extend the statute of limitations. A letter from an insurance carrier approximately seven months following the date of an injury to advise the employee that no further treatment would be authorized was considered to extend the statute of limitations. The court concluded that where an employee is lulled into a sense of false security by actions of the employer or its insurance company, the statute of limitations may be extended. A maintenance worker was injured when a ceiling tile fell on him on July 10, 1990. The insurance carrier notified him by letter on December 17, 1990, that he was to submit to a medical examination on December 26, 1990. Approximately three weeks following that date, he received a letter from the insurance carrier stating that there was no need for further medical treatment and advising him that the insurance carrier would

not be responsible for the payment of additional medical treatment. A claim petition was filed for workers' compensation benefits on January 8, 1993, more than two years from the date of the last authorized medical treatment on December 7, 1990 and the examination by the insurance company doctor on December 26, 1990 but less than two years from the date of the letter advising him that no further treatment would be authorized. The court reasoned that the sole purpose of the medical examination was to provide an opinion to the injured worker that no further medical treatment was necessary. Since the petitioner had no reason to believe that the medical evaluation in December of 1990 was not part of his continuing medical treatment, the statute of limitations did not commence to run until the report of the evaluation by the doctor, and therefore the claim was not time-barred. Witty v. Fortunoff, 286 N.J.Super. 280 (App.Div.1996).

### Medical Treatment

Furthermore, the New Jersey Supreme Court held that when an employee participates in an employer-funded voluntary program to monitor the existence or progression of an occupational disease, the participation is considered to constitute authorized medical treatment. The furnishing of such medical treatment extends the jurisdictional limitations to filing an Application to Reopen and Modify a Formal Award. An oil refinery worker was exposed to dust, fumes, chemicals, and asbestos from 1937 through his retirement in 1978. In April of 1985, the petitioner filed a claim petition alleging a pulmonary condition arising out of his occupational exposure, and an award was entered for pulmonary asbestosis. He applied to review and modify the formal award and was awarded more benefits. Even though the prior judgment did not incorporate medical monitoring reexaminations, they were furnished voluntarily by the employer. At approximately the same time as the petitioner's last medical monitoring examination, which occurred less than two years before the filing of the petitioner's second claim petition for the same medical condition, which was asbestosis, a personal evaluation revealed increased disability. Even though the second claim petition was filed several years after the petitioner's last award, the court considered it not barred by the statute of limitations since the voluntary medical examination was considered a payment of compensation, and the pleading was filed within two years of the examination. Milos v. Exxon Co., USA, 281 N.J.Super. 194 (App.Div.1995), Certification Granted 142 N.J. 457, Judgment Affirmed by 143 N.J. 333 (1996).

### Estoppel

In a logical leap forward after the Milios opinion, the New Jersey Supreme Court rendered a decision that leveled the playing field between the employer/insurance company and the injured worker. Consistent with the legislative mandate that medical treatment is directed by the employer, the New Jersey Supreme Court ruled that it stands to reason that collusion between an employer and its insurance companies at the expense of victims of industrial injuries cannot be permitted.

Lodean Sheffield was employed by Schering Plough Corporation for twenty-three years from the early 1960s through July of 1993. As a matron cleaning bathrooms, she was required to lift, bend, stoop and perform many other repetitive motion activities. Initially suffering from back problems in 1979, she received treatment for a back sprain and a disc condition. Early in 1983, her condition required surgical intervention, and her employer assisted her in obtaining benefits from the short-term disability carrier, Prudential. Schering Plough's benefits department then assisted her in obtaining benefits from Travelers Insurance Company, the employer's private-plan long-term disability carrier, and encouraged her to file for Social Security disability benefits. Payment for medical treatment was provided by the employer's major medical carrier, initially Prudential, and then subsequently John Hancock.

In February of 1989, the employee filed a claim petition alleging an industrial accident at work in June of 1983, resulting in orthopedic disability to her back and a neurological condition. Travelers Insurance

Company moved to join the predecessor carrier, Liberty Mutual Insurance Company. The insurance carriers raised the defense that the claim was time-barred since more than two years had expired from the date of the accident, and medical treatment paid for by collateral sources did not toll the statute of limitations.

The court, while avoiding the issue as to whether or not the petitioner had "actual knowledge", focused on the issue that medical payment expressly authorized or arranged for by the employer constituted authorized medical treatment whether or not that treatment was specifically paid for by the workers' compensation insurance company. The panel held that employer-authorized or directed medical treatment constituted a payment of compensation and that it was irrelevant whether the payment of medical benefits had been made by the health insurance carrier or the workers' compensation insurance carrier. The court reasoned that since the Workers' Compensation Act is remedial in nature, employees should not be lulled into a false sense of security as a result of the actions of the employer. Sheffield v. Schering Plough Corporation, et al., A-84-95 (August 9, 1996).

### Liens

In dramatic rulings, the Supreme Court expanded the availability of indemnification of third parties by way of liens and offsets. In the case of Frazier v. New Jersey Manufacturers Insurance Company, et al. 142 N.J. 590 (1995), the New Jersey Supreme Court enunciated the "functionally equivalent source" rule mandating that proceeds that were the functional equivalent of a recovery from the actual third-party tortfeasor are subject to liens asserted by workers' compensation carriers pursuant to N.J.S.A. 34:15-40. In a somewhat divided decision, the court concluded that a workers' compensation carrier has a right to reimbursement from the employee even if the employee is not fully compensated in the third-party action. These conclusions were reiterated in Utica Mutual Insurance Company v. Maran & Maran, et al, 142 N.J. 609 (1995). Furthermore, the reimbursement can occur even if the workers' compensation carrier did not institute a claim directly against the third-party tortfeasor and includes cases involving payment in connection with uninsured and underinsured motorist coverage.

The court held that a lien under N.J.S.A. 34:15-40 attaches to a malpractice lawsuit against an attorney who failed to institute an action against the third-party tortfeasor responsible for the employee's injuries. Even though there was not full recovery in the petitioner's opinion, the workers' compensation carrier was permitted to obtain full indemnification under its asserted lien. The court reasoned that the Legislature intended to integrate the sources of recovery and ensure the satisfaction of the lien. The court, therefore, overruled Wausau Insurance Companies v. Fuentes, 215 N.J.Super. 476 (App.Div.1986) and Charnecky v. American Reliance Insurance Company, 249 N.J.Super. 91 (App.Div.1991), and rejected the theory that uninsured motorist coverage was to be considered a collateral recovery not subject to lien reimbursement. The court deemed the "functionally equivalent source" rule to have retroactive application.

### Subrogation

In another matter involving third-party recovery, the court ruled that the party asserting the lien is bound by the same criteria as the plaintiff. In a subrogation action, the workers' compensation carrier is subject to the same defenses that the petitioner would have been subject to if the petitioner had brought an action against the ultimate wrongdoer. Where the petitioner has elected the verbal threshold, this selection bars the employer's claim for reimbursement under N.J.S.A. 34:15-40. Since the injured worker was subject to the verbal threshold, his workers' compensation insurance carrier is subject to the same defense in an action against the defendant. Continental Ins. Co. v. McClelland, 288 N.J.Super. 185 (App.Div.1996).

## Pension Offset

In a case in the United States District Court, it was determined that pension benefits paid under ERISA supersede any and all state laws, including workers' compensation payments. Therefore pension benefits could be offset by the amount of an employee's state workers' compensation benefits. Stires v. Sprint Corporation, 1995 WL 632077 (D.N.J.) 29 U.S.C. s1144(a).

The Supreme Court held that a pension similar to the New Jersey Public Employees' retirement system pension offered by the State of New York to employees of the Port Authority of New York and New Jersey was subject to offset. An injured worker who was an employee of the Port Authority of New York and New Jersey, a bi-state agency, and who was receiving a disability pension under the applicable New York State statutes was precluded from collecting workers' compensation benefits in the State of New Jersey for the same disability. The injured worker was required to obtain a certified statement of benefits under the operative New York State law as a condition of any obligation to pay workers' compensation benefits under New Jersey's Workers' Compensation Act. The court concluded that the disability-retirement benefits afforded under the New York State law were to be deducted from the New Jersey workers' compensation award. Bunk v. Port Authority of New York and New Jersey, 279 N.J.Super. 613, Certification Granted by 141 N.J. 99, Judgment Reversed by 144 N.J. 176 (1996).

## Scientific Evidence

The Appellate Division also focused on issues concerning the admissibility and weight of evidence. A police officer failed to show that the conditions surrounding his work environment were peculiar to the employment and also failed to demonstrate with objective medical evidence that his medical condition was related to his environmental exposure at work. The petitioner did not produce any reliable scientific evidence about his exposure and the substances in the workplace and failed to demonstrate that the atmospheric conditions at work exposed him to risks that were greater than those in his daily life. There were no articles, treatises, or medical studies offered that demonstrated a causal relationship between the petitioner's medical condition and his employment. Laffey v. City of Jersey City, 289 N.J.Super. 292 (App.Div.1996).

## Causal Relationship

A laborer and truck driver who was required to load asbestos debris and dump asbestos waste for over 30 years died of colon cancer metastasizing to his lungs. The plaintiff's medical expert, a licensed physician who specialized in occupational medicine and had a doctorate in epidemiology, testified that it was his opinion that the asbestos exposure did not cause cancer but that it substantially contributed to the development of the disease. The court rejected the requirement of a 2.0 relative risk threshold standard and followed the court's prior ruling that a review of the relative risk factors could determine whether the medical evidence was sufficient to support causal relationship between the exposure and the disease process. In this instance, the court deemed the evidence acceptable based upon the fact that the medical expert's statistical meta-analysis reflected a Standard Mortality Ratio of 1.61 (61% increase in the risk of colorectal cancer mortality) and the fact that the risk was statistically significant, namely that the asbestos exposure was a significant factor in addition to other factors such as diet, genetic factors, rare diseases, and sedentary lifestyle. The expert could also relate asbestos exposure to other carcinogenic risk factors. Jones v. Owens-Corning Fiberglas Corporation, et al., 288 N.J.Super. 258 (App.Div.1996).

## Expert Testimony

The Appellate Division also affirmed a judge who disregarded the respondent's medical expert based upon the fact that the expert's field of practice was heavily based in neurology rather than psychiatry, while the petitioner's expert only practiced in the field of psychiatry. The judge was further permitted to use his expertise to determine whether the petitioner was, in fact, a malingerer. Watson v. George Delp and Sons, No. A-003543-94T, slip op. (App. Div. Jan. 16, 1996) (per curium).

### Attorney's Responsibility

The responsibility of a workers' compensation attorney in the handling of a case and communicating with his or her client was addressed by the New Jersey Supreme Court. An attorney was suspended from the practice of law for three months after he was retained to handle a workers' compensation matter on a referral from another attorney, and he failed to take any action on the matter, communicate with the client or the attorney referring the matter, or deliver the file to a new attorney selected by the client. Matter of Ortopan, 143 N.J. 586 (1996).

### Conclusion

The courts have continued to hand down decisions that are consistent with the social remedial intent of the Workers' Compensation Act while at the same time, they have required that injured employees meet stringent evidentiary and, where applicable, scientific standards.

By Jon L. Gelman, Attorney at Law.

Jon L. Gelman of Wayne NJ is the author of NJ Workers' Compensation Law (West-Thomson-Reuters) and co-author of the national treatise, Modern Workers' Compensation Law (West-Thomson-Reuters). For over 5 decades the Law Offices of Jon L Gelman 1.973.696.7900 jon@gelmans.com has been representing injured workers and their families who have suffered occupational accidents and illnesses.

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R96

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# WORKERS' COMPENSATION LAW

## REVIEW OF THE NJ SUPREME COURT TERM 1995-1996

BY JON L. GELMAN

The 1996 court term saw the Supreme Court consider occupational disease claims, defenses to suicide, procedural requirements regarding third party liens, further defined standards to be utilized in the determination of evidence and set forth parameters concerning the nature and extent of disability under the Workers Compensation Act. Both the New Jersey Supreme Court and the Appellate Division were quite active in ruling in issues relevant specific to the Workers Compensation Act (such as the "going and coming" rule, the "dual purpose" rule, the "personal comfort" rule, coming and going rule, aggravation of pre-existing conditions, medical treatment, present benefits, and the availability of benefits) but also in other areas of both statutory and case law.

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In the first case to come before the New Jersey Supreme Court involving the noticeable evidence standards set forth in Fiore v. Consolidated Freightways, 140 N.J. 452 (1995), the court addressed a particular fact